

THE MACFARLANE TRIAL.

(Continued from Page 9.)

show what he wished to prove by the witness.

Court ruled that the examination might as well go on.

Q.—During the years 1886 and 1887, what branch of the business did your brother, defendant, manage?

A.—Generally, the foreign branch, and exercised a general supervision of the business; my brother Henry attended to the matter of sales; the sales of goods referred to in this case were managed entirely by my brother Henry; my brother (defendant) took no part in receipt of orders or delivery of goods; he took no part in the settlement; my brother Henry made the settlement; my brother George was on his way to or in England, I think, when the settlement was made; after the adjournment of the Legislature in 1886, I cannot say exactly the times he was here and the times he was absent; his time was devoted almost exclusively, during that session of the Legislature, to the matter of the loan bill; relations between my brother and Hayselden were strained during that time; after the passage of the loan act, in September or October, my brother and Hayselden met at the Hotel; Hayselden offered his hand saying, I hope you have no ill-feelings, regarding the loan business, toward me; my brother answered, disclaiming any ill-will; my brother Henry delivered goods on these orders; Macfarlane & Co.'s part of the transaction was, that the two stores supplied each other when necessary to fill orders of any kind.

Cross-examined by Attorney-General.

Q.—If your brother Henry had exclusive charge of these orders and delivered, how do you know all the details of the transactions?

A.—I make entries in the books and go from one store to the other every day and know the transactions in both.

Q.—When, for the first time, did you advance the statement that these goods were sold to the King or were settled by the King?

A.—I never stated otherwise. At the preliminary examination, I was not asked the question. When you were examining the books of G. W. Macfarlane & Co., and were through with it, I came into the room, and you said that so far as the entries were concerned, all was apparently straight, but you would be frank in saying that you would make the point that the transactions were contrary to law.

Re-examined—The King asked me to keep this account separate (the "election gin" account).

His Majesty the King comes into Court, takes a seat on the bench, and is duly sworn.

Q.—Do you remember about the purchase of certain liquors from G. W. Macfarlane & Co. in 1886 and 1887, that were intended to keep a separate account of?

A.—I do.

Q.—About this particular bill of liquors, on whose order were they delivered?

A.—Different persons.

Q.—Who bought the goods?

A.—They were bought for my use.

Q.—What particular directions did you give about the keeping of those accounts?

A.—I ordered the accounts to be kept in my name, Hayselden's, the Chamberlain's, and Lili'okalani's and Kapena's sometimes; do not remember as to Keon.

Q.—Did you yourself order any goods in person?

A.—I did.

Q.—Did any other persons order any?

A.—Yes; Lili'okalani, Kapena, Hayselden and others.

Q.—How were those accounts settled?

A.—My liquor account was to be kept separate from my merchandise account. These accounts were settled in cash and Custom House orders.

Q.—What proportion of the spirit account was settled by Custom House orders?

A.—I cannot exactly remember.

Q.—Was that account your own account?

A.—I think it was.

Q.—Can you tell what proportion of the account was settled by rebates of duties?

A.—I cannot remember.

Q.—Can you state for what part of the account settled by you Custom House orders were given?

A.—I cannot tell.

Q.—Can you tell what instructions had been given by you to Henry Macfarlane?

The question was objected to by the Attorney-General, as the orders of His Majesty and Hayselden's subsequent arrangements might be entirely different.

Mr. Hatch claimed that it was competent to show whether Mr. Hayselden was an agent of His Majesty.

Q.—What instructions did you give Mr. Hayselden with reference to the settlement of this account?

A.—All my dealings were with Mr. Henry Macfarlane. I instructed him to make out the account to Hayselden, in accordance with instructions given to him (H. Macfarlane).

Exhibits A, B and C, the three orders, were shown to His Majesty.

Q.—Were these accounts settled by your Majesty's instructions?

A.—I directed the Chamberlain to have the account all settled.

Cross-examined by Attorney-General (orders are presented to His Majesty). When Your Majesty signed the orders, were they in the condition in which they appear now, or were the endorsements separate from the list of liquors?

A.—I cannot say; do not remember that.

Dr. Trousseau, called—I am acquainted with Mr. Henry Macfarlane. He is, undoubtedly, not in a condition to come into Court.

G. W. Macfarlane, called—I am acquainted with this case. I heard all that has been testified regarding the sale of this amount of goods, \$4,000 and odd; first became aware of deliveries being made in the early part of '86; derived my knowledge from deliveries that I saw going out, and the book entries; personally I had nothing to do with it; had nothing to do with the account whatever; it was all settled by my brother Henry; when it was settled I was out of the country; knew of its being settled after my return from England; that was the first

I knew of the actual settlement; left September 1, 1886, for S. F.; returned October 8; left again October 30; returned November 17; left again November 23 and went to England; was absent 10 or 11 months. Had no agreement whatever with Hayselden with regard to the settlement of his account; all I ever had to do with Hayselden was: In August, 1886, I heard him and Henry discussing the matter of checking over the orders; my brother seemed annoyed over the delay Hayselden was showing in the matter; forgot whether it was on that or another day that I noticed Henry pressing him to attend to the matter; saw my brother a good deal annoyed; was not on speaking terms with Hayselden; took occasion to speak sharply to him about the account; spoke of suing him; he said, it is all right, Henry and I are attending to it; it will be settled by a King's order or in some other way; I said, well, settle it some way or other; left him and supposed he would attend to the matter; shortly after that, I went to San Francisco; previous to this interview, for some months, I had not been on terms with him; he was fighting in Mr. Spreckels' interest during the whole of the session of the Legislature; I knew he was opposing the loan bill, with Mr. Gibson, in Mr. Spreckels' interest; the disagreement became hotter and hotter between us during the session; I met him afterward; he offered to shake hands, said he did not want to keep up any ill-feeling; I said I had no desire to keep up the quarrel. In the interview before the Cabinet, I stated what I had learned from my brother; I did not say that I had sold goods to Hayselden; I used the term "we;" I was speaking of the firm; I knew Hayselden was buying these liquors; he said they were on the King's account, but my brother had all to do with the matter; the firm looked to the King for the payment of the account; Hayselden had little or no individual credit at the firm; would not have extended a credit of \$4,000 to him without some guarantee; heard my brother's statement with regard to the settlement of the account; it was correct as far as I knew.

Cross-examined by the Attorney-General—I first learned of this settlement after my return from England, about two months; a trial balance is generally handed me at the end of each quarter; I make remarks on accounts; give instructions relative to accounts that seem to need looking after; I was in Honolulu in 1886 until after the passage of the loan bill, was in charge of my business; do not remember specially looking at the King's or Hayselden's account; was aware of considerable orders being filled to different parts of the Kingdom; and to whatever persons His Majesty directed them to go or to be sent; was in Honolulu, October 21, 1886, and on April 20, 1887, that is, I suppose I was.

Mr. Neumann closed to the jury on behalf of the defendant, and the Hon. Attorney-General on behalf of the prosecution. The reviews of the evidence and arguments on all the points at issue were ably presented by those two gentlemen.

THE JUDGE'S CHARGE.

His Honor commenced his charge to the jury at 5:20 p. m. Said the lawyers and witnesses had done their part. It now remained for the jury and for him to do their parts. His Honor then presented to the jury, instructions suggested by counsel which he approved. Following are the instructions on behalf of the Crown:

If the jury believe from the evidence that defendant was a party to any agreement with Hayselden, the intent and purpose of which was to obtain liquors from the Custom House for use and sale in the course of defendant's business, without having paid or secured the duties thereon, or without such duties having been paid or secured, they should convict the defendant under the second and third counts.

It is not necessary to show, in proof of such agreement or combination, that a proposition in any exact words or terms should have been made by the one and accepted by the other of the parties. It is sufficient, if the jury believe that their minds and intentions met upon the purpose to so withdraw such liquors, without the payment or securing of duties thereon.

It is not necessary that the Crown should prove the acts or conspiracy alleged, to have occurred upon the date set forth in the indictment. Time is not of the essence in a case of this nature. If the jury believe from the evidence that a conspiracy such as is charged in the indictment was made by defendant and Hayselden at a time so near that charged in the indictment as to convince the jury that it is the same offense referred to and charged in the indictment, they should convict.

It is not necessary to constitute a conspiracy that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme is to be, and the details of the plan or means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly, come to a mutual understanding to accomplish a common and unlawful design.

The law does not require direct proof of these facts, but they may be proved by facts and circumstances which show them beyond a reasonable doubt.

If the defendant was a consenting party to any agreement with Hayselden by which was set on foot the alleged removal or removals of the liquors in question, for the purpose, and with intent to avoid the payment of legal duties thereon by the use of the King's signature, it is not material whether he was present or absent from the country at the date or dates when the orders for such withdrawals were presented at the Custom House.

The instructions on behalf of the defense, prepared by counsel and allowed by the Court, were:

Conspiracy being the gist of the

offense, the Crown must prove and the jury be satisfied that there was in fact an actual combining between the defendant and Hayselden fraudulently and knowingly entered into to effect a common object.

Mere proof of a wrong intent by one is not sufficient.

The fact of a conspiracy must be proved by clear and satisfactory evidence beyond any reasonable doubt.

The confederation must be corrupt or fraudulent and an evil intent is necessary to constitute the offense of conspiracy.

A mere cognizance of fraud or of the illegal action of others is not sufficient to show a conspiracy; an active participation is necessary or an acceptance or adoption of a proposition of another to do a criminal or wrongful act.

No evidence has been given on which the defendant could be held on the first count.

No conspiracy can be inferred from acts done by others, in pursuance of the conspiracy, than the defendant and Hayselden and their agents.

To find the defendant guilty, you must find that a definite agreement or understanding was entered into between the defendant and Hayselden.

If you can reconcile the facts with innocence you must do so. You can convict only if from the facts proved you cannot arrive at any other conclusion than the defendant's guilt.

His Honor continued:

A great deal of testimony has gone before the jury not applicable to the case. Possibly evidence not strictly relevant may have been allowed by the Court, but it was in order not to deprive defendant of every opportunity to make a complete defense, if such existed.

The defendant is guilty if found to have been knowingly concerned with Hayselden in a mutual understanding for the removal of goods from the Custom House without payment of duties, unless he was within the exceptions allowed by the statute. It was necessary for him to show that he had taken the goods out legally. (His Honor here read the law bearing on withdrawals without payment of duties, and specifying who are exempt from the payment of duties). Defendant had, in order to show his innocence, to place himself within these exemptions. It was incumbent on him to show that he had withdrawn the goods for the use of the King, representatives of foreign governments or the Hawaiian Government. Goods going into the stock of a dealer or any one else is not a use by or for the King. All the important testimony centers about this one issue. (The testimony of Messrs. Austin and Ashford and the examination of the books of G. W. Macfarlane & Co. by the Attorney-General were here referred to by the Court). The questions relating to what was called "election gin" did not appear to the Court to be of so much importance as was attached to them by counsel. It was a question of fact for the jury to decide whether the goods enumerated in the orders, exhibits A, B and C, were withdrawn for His Majesty's use. There were two sets of liquors referred to in the evidence, and it was necessary to distinguish between them. The first set consisted of the liquors withdrawn in the early part of the year 1886; the other consisted of the liquors set forth in the orders before the Court, exhibits A, B and C, and dated respectively September 10th, December 24 and December 24, 1886. The total amount of the remitted duties on these three orders coincides with the amount of the liquors charged to Hayselden, the lot of liquors delivered in the first part of the year, in January and February, which had been referred to as election liquors. Defendant claims his not knowing about the details of the business of G. W. Macfarlane & Co. He admits having threatened Hayselden to sue him, to which Hayselden said he would bring an order, upon which defendant said, "Anyway you like, but settle it." The admissions of a man, made voluntarily, as against his own interest, are regarded in law as very strong evidence. To convict defendant, you have to find that he understood and accepted the arrangement alleged to have been made with Hayselden in regard to the crediting off of Hayselden's account by the remitted duties of goods to be obtained under the King's orders. If you find that Hayselden proposed the arrangement and that defendant adopted it; that is conspiracy. The question is to ascertain whether conspiracy existed and whether the conspiracy was for the removal of goods from the Custom House, in the manner alleged. If the defendant is found guilty on the second or third count or both, it must be in the second degree.

The jury retired at 5:45 p. m. to consult on their verdict.

The jury came forth two or three times during the night seeking instruction. Once they wanted to know what the penalty was for the second degree, but the Court informed them in effect that they had nothing to do with penalties.

SATURDAY, April 28th.

At 1:45 a. m. the jury returned the following verdict: "On the first count, not guilty; on the second count, disagree; on the third count, guilty in the second degree. (Signed) F. Turrill, foreman."

Mr. Hatch moved that the jury be polled in regard to their finding of guilty.

Mr. Peterson, Deputy Attorney-General (the Attorney-General being absent), confessed his unpreparedness to raise objections to the motion, as the thing proposed would be an innovation in this country.

The Court, after Mr. Hatch had quoted Massachusetts Reports as authority, instructed the Clerk to call the jury roll, and the jurors to answer "guilty" or "not guilty" (on the third count).

On the third count in the indictment on which the defendant was found guilty is not sufficient in law. 2. That the verdict of the jury was contrary to law and evidence. 3. For misconduct of the jury. 4. For irregularity in the empanelling of the jury. 5. For newly discovered evidence. Which motion the Court overruled. Mr. Hatch then argued, as reasons for a lenient sentence, that whereas the conspiracy statute makes the offense of conspiring to receive dutiable goods without payment of duty, punishable by imprisonment up to two years, or by fine up to \$200, yet the statute of 1886 imposes no penalty of imprisonment for the offense of so removing such goods, without the payment of duty. It would thus seem hard to punish a conspiracy to commit an offense by imprisonment, when, had the offense itself been committed, only a pecuniary fine could be imposed as a penalty for such offense. Therefore, in this case, counsel argued, the Court being invested with a discretion of the matter, no imprisonment, but only a fine should be imposed.

The Attorney-General stated to the Court that the object of the Government in bringing these prosecutions against Messrs. Macfarlane and Luce had been, not to secure the imprisonment of the defendants, but a desire to obtain an authoritative legal construction of the statutes involved, to learn whether, as a matter of law, the acts of the defendants constituted a violation of those statutes, and if it should be found that they had so violated the statutes, that these prosecutions might serve as a deterring influence upon the rest of the community, while at the same time vindicating the law which had been broken. With respect to the defendant at the bar, he felt that the verdict of the jury, under the instructions as given by the Court, had furnished a complete justification of the course and purpose of the Government, and a sufficient vindication of the law; so that no imprisonment of the defendant was necessary to complete such vindication. There was no desire on the part of the Government, or of the speaker personally, to see defendant imprisoned. While it was true that the wide extent of similar or kindred transactions in the community during years past did not excuse nor even extenuate the position and course of the defendant, yet it might well be considered as a mitigating circumstance in the matter of sentence. He thought, while deferring to the Court, with whom and in whose discretion the severity or leniency of the sentence rested, that it might well be considered harsh and unfair that defendant should be imprisoned upon this, the first conviction of the kind in this country. He would, therefore, respectfully suggest that the infliction of a pecuniary fine would meet all the purposes of justice, in this case, and would request that, in passing sentence, no imprisonment be inflicted, but that the Court do confine itself to the infliction of a fine.

THE SENTENCE.

Judge Dole calling on the defendant to come forward passed sentence upon him in the following terms:

You are found guilty of the offense of conspiracy in the second degree. The law authorizes the infliction of imprisonment at hard labor for not more than two years, or a fine of not more than two hundred dollars as the penalty.

Among other defenses your counsel urged that the removal of goods from the Custom House without paying duties thereon, by means of orders of parties who are by statute exempt from paying duties upon goods, is and has been a common practice in this community. There is strong reason from the evidence in this case, and the case of the King vs. Luce, to believe that for some time past, until lately, some of the highest officers in the Government have not only openly contended such transactions and made it easy to carry them out, but have been themselves parties to them. But this fact is no defense to any offense against the laws of the country. I am inclined, however, to regard this state of things as a proper matter to consider in mitigation of the offense of which you have been found guilty. It is natural that if the legal administrators of the laws, and other persons of influence, encourage disobedience to them, by both precept and example, the public conscience becomes inevitably demoralized; it is natural for men to be strongly influenced in their attitude towards the laws, by the attitude of those who by their official responsibility may be regarded as the authoritative champions of the laws, and where such attitude is unlawful and immoral, many are inevitably misled into wrong conclusions. It therefore seems to me that I may reasonably and justly, both from the standpoint of the Government and of yourself, and in view of the recommendation of the Attorney-General, make your penalty a fine instead of imprisonment, which I fix at the sum of two hundred dollars and costs.

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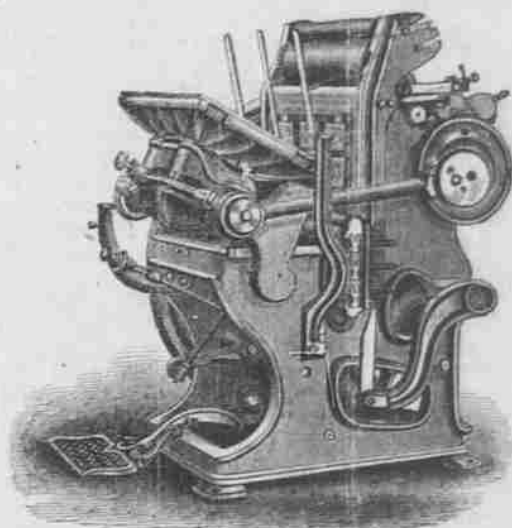
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